89-1872 (1)

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE CITY OF SANSOM PARK, TEXAS, ET AL,
Petitioners/Defendants,

v.

DANA PEELMAN, ET AL
Respondent/Plaintiff.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(A) WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT POSSESSED, JURISDICTION TO CONSIDER PETITIONERS INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION?

(B) WHETHER RESPONDENTS ADDUCED PROBATIVE EVIDENCE SUFFICIENT TO OVERCOME THE SUMMARY JUDGMENT PROOF IN SUPPORT OF THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT FOR SANSOM PARK POLICE SERGEANT EDWARD D. HAYNES THAT HE DID NOT VIOLATE ANY LAW THAT WAS CLEARLY ESTABLISHED AT THE TIME OR, IN THE UNLIKELY EVENT THAT HE DID SO, HE DID SO UNDER SUCH EXTRAORDINARY CIRCUMSTANCES THAT HE NEITHER KNEW NOR SHOULD HAVE KNOWN THAT HE WAS VIOLATING LAW THAT WAS CLEARLY ESTABLISHED AT THE TIME?

(C) WHETHER RESPONDENTS ADDUCED PROBATIVE EVIDENCE SUFFICIENT TO OVERCOME THE SUMMARY JUDGMENT PROOF IN SUPPORT OF THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT FOR FORMER CHIEF OF POLICE KENNETH McMULLEN THAT HE DID NOT VIOLATE ANY LAW THAT WAS CLEARLY ESTABLISHED AT THE TIME OR, IN THE UNLIKELY EVENT THAT HE DID SO, HE DID SO UNDER SUCH EXTRAORDINARY CIRCUMSTANCES THAT HE NEITHER KNEW NOR SHOULD HAVE KNOWN THAT HE WAS VIOLATING LAW THAT WAS CLEARLY ESTABLISHED AT THE TIME?

(D) WHETHER RESPONDENTS ADDUCED PROBATIVE EVIDENCE SUFFICIENT TO OVERCOME THE SUMMARY JUDGMENT PROOF IN SUPPORT OF THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT FOR THE CITY OF SANSOM PARK THAT IT HAD NO ACTIONABLE POLICY OR CUSTOM WHICH WAS THE PROXIMATE CAUSE OF ANY DEPRIVATION OF A CONSTITUTIONAL RIGHT OF BRADLEY PEELMAN AND RESPONDENTS?

PARTIES TO THE PROCEEDINGS

The Petitioners are The City of Sansom Park, Texas, Sergeant Edward D. Haynes, and Kenneth McMullen, Chief of Police. The Respondents are Dana Peelman, Individually and as Next Friend for Matthew Peelman, a minor, and as Community Survivor of the estate of Bradley Peelman, deceased.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The City of Sansom Park, Texas, Sgt. Edward D. Haynes, and Kenneth McMullen, Chief of Police were the Defendants/ Appellants in the Court of Appeals. These parties will be hereinafter collectively referred to as Defendants. The individual Defendants will be singularly referred to by their given names.

Dana Peelman, individually and as next friend for Matthew Peelman, a minor, and as community survivor of the estate of Bradley Peelman, deceased, was the Plaintiff/Appellee in the Court of Appeals. These parties will hereinafter be collectively referred to as Plaintiffs. The various individual Plaintiffs will be singularly referred to by their given names.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was not reported. It appears in Appendix A. The opinion of the United States District for the Northern District of Texas - Fort Worth Division, was also unreported. This opinion appears in Appendix A.

JURISDICTION

The Judgments of the Court of Appeals for the Fifth Circuit were entered on January 26, 1990 and February 28, 1990. The jurisdiction of this Supreme Court is invoked under 28 U.S.C. §1254 (1)(1989).

RELEVANT STATUTORY PROVISIONS

42 U.S.C. §1983 states, in relevant part, that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

(A) Statement of Nature of Case - The 42 U.S.C. §1983 Claims and The State Tort Pendent Claims Summarized from the Complaint (Tr. 1-13) and the Supplemental Complaint

(Tr.140-146), Plaintiffs seek the recovery of actual and punitive damages, attorney's fees and interest pursuant to 42 U.S.C. §1983 of The Federal Civil Rights Act and actual and special damages for negligence under the law of The State of Texas for the allegedly-wrongful death of Bradley Peelman on May 14, 1987.

(B) Course of Proceedings Dana Peelman, individually, as Community Survivor of the Estate of Bradley Peelman, and as Next Friend for Matthew Peelman, the minor son of Dana Peelman and the late Bradley Peelman, filed their Complaint against The City of Sansom Park, Sgt. Edward D. Haynes and Kenneth McMullen on June 2, 1987 (Tr. 1-13). Defendant Edward D. Haynes' Original Answer was filed on June 24, 1987 (Tr. 21-27). Defendants City of Sansom Park and Kenneth McMullen's Original Answer was filed on June 25, 1987 (Tr. 28-35).

Following a course of non-dispositive litigation activity and a series of oral depositions spread over a substantial period of time, Defendants filed their Motion of Defendants For Summary Judgment And To File Depositions on April 14, 1989 (Tr. 341-578). Although Plaintiffs were required by Order (Tr. 312-313) to effect service on the appropriate parties of a response by Plaintiffs to Motion of Defendants For Summary Judgment by April 21, 1989, Plaintiff's Response To Motion Of Defendants For Summary Judgment was not filed until April 24, 1989 (Tr. 601-745). By Order dated May 3, 1989, and filed on May 4, 1989, the United States District Court denied the Motion of Defendants For Summary Judgment (Tr. 748).

On May 16, 1989, Defendants filed their Notice Of Immediate Interlocutory Appeal From Order Of Honorable United States District Court Denying Motion of

Defendants For Summary Judgment. The Individual Defendants sought appeal on their asserted Qualified Immunity Defenses. The City of Sansom Park, Texas appealed under the doctrine that a municipality cannot be liable in the absence of an actionable policy or custom or whenever its employees commit no constitutional wrong.

By Opinion dated January 26, 1990, the United States Court of Appeals for the Fifth Circuit dismissed the Interlocutory Appeal for lack of jurisdiction, holding in summary, that factual issues material to immunity are in dispute. The Appellate Court held that the District Court's denial of Summary Judgment sought on the basis of immunity was not appealable. The Circuit Court also held that it lacked jurisdiction under 28 U.S.C. §1292(b) (1989).

Defendants respectfully filed their Petition for Rehearing on January 16, 1990.

This Petition was denied on February 28, 1990.

On or about May 3, 1990, Defendants filed their Motions to Recall and Stay Mandate. Defendants now file their Writ of Certiorari with the United States Supreme Court.

(C) Statement of Facts Dana Peelman is a citizen of the United States and a resident of Wise County in the State of Texas, is the mother of Matthew Peelman (a minor), is the widow of Bradley Peelman, deceased, and is the Community Survivor of the Estate of Bradley Peelman. The City of Sansom Park is a municipal corporation incorporated under the laws of The State of Texas and is situated in Tarrant County, Texas. Sgt. Edward D. Haynes of the Sansom Park Police Department was a duly-appointed and acting police officer for The City of Sansom Park on May 14, 1987. Former Chief of Police Kenneth McMullen was the duly-

appointed, qualified and acting Chief of Police for The City of Sansom Park on May 14, 1987.

On May 14, 1987, Sgt. Haynes shot Bradley Peelman in the line of duty. Bradley Peelman died shortly thereafter.

Defendants take the position that Plaintiffs have adduced no probative evidence to defeat the Motion of Defendants For Summary Judgment. An effort will be made below to summarize the essential contentions of a factual nature of the respective parties:

-(1) **For The Plaintiffs** The Plaintiffs contend that at about 10:00 P.M. on May 14, 1987, "Bradley Peelman went through the intersection of Kiowa Avenue and Buchanan Street in the City of Sansom Park, driving into the yard of a home facing Kiowa Avenue, and struck a porch column of the home. In order to get his pickup out of the yard, Bradley Peelman put his vehicle in reverse

and backed out onto Buchanan Street. At that time, Defendant Haynes fired several shots into the pickup driven by Bradley Peelman, mortally injuring him. Two other Sansom Park police officers pursued the vehicle on foot as it continued backward across Buchanan and into a ditch. Upon the truck's stopping, Bradley Peelman got out and collapsed, bleeding profusely."(Tr.3-4)

Plaintiffs further contend that "Defendants took custody of Bradley Peelman and despite the fact that the incident occurred across the street from the Sansom Park City Hall which also houses their Fire Department with an ambulance on the premises and emergency technicians on call, Defendants allowed Bradley Peelman to bleed to death while in their custody without giving him or allowing anyone else to give him any medical aid whatsoever while waiting for an ambulance from a nearby city to arrive." (Tr. 4)

Plaintiffs contend that the use of deadly force against Bradley Peelman was unnecessary (Tr. 4); that "the actions of Defendants Haynes and McMullen implement or execute policies of governmental customs maintained by Defendant City of Sansom Park with respect to the use of force and deadly force by the Defendant City's police officers and to the failure to meet the serious medical needs of persons in their custody" (Tr. 5); that the City of Sansom Park in line with its purportedly-usual policies and procedures failed to train or instruct its police personnel as to the amount and degree of force that may be used in effecting an arrest and detaining a person, failed to supervise police personnel in effecting arrests and the use of deadly force, failed to ensure that police officers do not use excessive force or unreasonable deadly force in detaining persons, failed to train or instruct its police personnel as to the

need to meet the serious medical needs of persons in their custody, failed to supervise police personnel in the treatment of persons in their custody, failed to ensure that its police officers meet the serious medical needs of persons in their custody, and failed to take appropriate administrative and disciplinary action when police officers have used either excessive force or deadly force without adequate justification or have been deliberately indifferent to meet the serious medical needs of persons in their custody (Tr. 5-6); that The City of Sansom Park and Chief McMullen "as a matter of policy or custom employ, entrust and afford persons with either intellectual or emotional deficiencies and without adequate training" the "privilege and responsibility of working as policemen and carrying weapons with which they can inflict injury and death" when they "cannot exercise proper judgment in their work" and that such was

"the direct cause of the constitutional deprivations and injuries" of which Plaintiffs complain (Tr. 6); that former Chief of Police McMullen acting for The City of Sansom Park failed to screen applicants and train and supervise police personnel properly and failed to establish adequate guidelines as to the use of force or deadly force in arresting and detaining suspects and as to providing or allowing others to provide medical treatment to persons in their custody (Tr. 6-7); that The City of Sansom Park and former Chief McMullen either knew or should have known that it was usual as a matter of policy or practice for their police officers to use excessive or deadly force without adequate justification and for their police personnel to exhibit a deliberate indifference to serious medical needs and by their failure to properly train and supervise police officers condoned, if not encouraged, the

pursuit of unconstitutionally excessive or deadly force (Tr. 7); that the City of Sansom Park is liable for the alleged carelessness and negligence of Sgt. Haynes in unnecessarily subjecting Bradley Peelman to mortal danger under the circumstances in shooting Bradley Peelman without justification, in requiring its police officers to purchase and carry firearms of their own choosing as they saw fit and in failing to instruct police officers sufficiently in the use of such firearms, in requiring police officers to carry firearms in the course of their duties without providing adequate training in particularly the use of deadly force, in failing to give its police officers sufficient instructions and training in connection with their duties as police officers, in failing to require police officers to demonstrate skill and judgment in the use of firearms at regular intervals, and in failing to use

reasonable care, caution and prudence under the circumstances; and which purported acts or omissions were the cause of the damages which Plaintiffs seek to recover (Tr. 1-13 and 140-146).

-(2) **For The Defendants** When Sergeant Haynes was hired as a police officer, he was already certified as a law enforcement officer by the Texas Commission on Law Enforcement Standards and Education who had successfully completed the 360-hour classroom and field-training course at the Regional Police Academy at the Northeast Campus of Tarrant County Junior College in 1984 and who had successfully passed the state-mandated psychological profile. During his certification training at the Regional Police Academy, Sgt. Haynes was trained in, and on May 14, 1987, was knowledgeable about, The Texas Penal Code and The Texas Code of Criminal Procedure, including Sections 9.31, 9.32, 9.33, 9.34 and 9.51 of

The Texas Penal Code concerning the use of force, and Articles 6.05, 6.06 and 6.07 of The Texas Code Of Criminal Procedure concerning the prevention of a threatened or other injury. (Tr. 356-359) During the entire time that Sgt. Haynes worked at the Sansom Park Police Department, it was always the policy of The City of Sansom Park, its City Council, and Chief McMullen to follow and obey all of the laws of the State of Texas and the United States, and it was the policy and custom of Chief McMullen to enforce that policy and custom with discipline if there was ever a breach of it. The City of Sansom Park and Chief McMullen encouraged regular review of The Texas Penal Code and The Texas Code of Criminal Procedure and additional training. The City of Sansom Park paid for additional training for Sgt. Haynes after he was employed there. He had been through Crime Scene Search School for 40 hours, the Texas

War on Drugs at Amon Carter Museum in Fort Worth and attended another training session on Family Sexual Crises at Tarrant County Junior College Northeast Campus, to which he paid his own way. The Sansom Park Police Department also had in-house and in-service training.

A background inquiry at North Richland Hills Police Department, where Sgt. Haynes worked immediately prior to the time when he was hired as a full-time officer by the Sansom Park Police Department, reflected no negative information about Sgt. Haynes. (Tr. 370 and 464-467) He appeared in every respect to be qualified as a law enforcement officer and performed his duties well for the approximately-two years while he was with the Sansom Park Police Department prior to May 14, 1987, and never had demonstrated any need for additional training in the use of force or a weapon. (Tr. 356 and 371)

No improper use or display of deadly force on the part of Sgt. Haynes ever came to the attention of Chief McMullen prior to or during the time that Sgt. Haynes worked for the Sansom Park Police Department. It was the policy and custom of Chief McMullen to demand that Sansom Park Police Officers obey the laws of Texas and of the United States at all times. "Nothing else was acceptable." (Tr. 369-370) An investigation made of Sgt. Haynes while he was employed by the North Richland Hills Police Department before he was hired as a full-time Police Officer by the Sansom Park Police Department developed no negative information reported to Chief McMullen concerning any use of excessive or deadly force or any propensity for violence on the part of Sgt. Haynes but developed positive information about him. Sgt. Haynes was already a Reserve Officer at the Sansom Park Police Department, with

"no problems in any of those or other areas". (Tr. 370)

Chief McMullen "often" rejected applicants for police officer positions at the Sansom Park Police Department and "rejected other applicants later during our screening process". "Our policy was to hire only qualified applicants. Neither prior to nor during the time when he was employed by the Sansom Park Police Department did I ever feel that Sgt. Haynes was not qualified or that he could not capably handle any assignment as a police officer." (Tr. 370)

Chief McMullen "had a thorough investigation conducted of the shooting of Bradley Peelman and concluded that Sergeant Haynes at all times followed state law and acted in accordance with Section 9.33 of The Texas Penal Code and other law and his use of force against Bradley Peelman was justified." (Tr. 370) Chief McMullen

states, "If I thought otherwise, I would have fired him. I have certainly disciplined other police officers in the past." (Tr. 370-371)

Chief McMullen "neither knew nor was aware of anything which did or would have led" him "to believe that Sergeant Haynes was not fully qualified to deal with the situation with which he was confronted by Bradley Peelman when he shot Bradley Peelman in defense of Reserve Officer Lovelady and many others on May 14, 1987, and in accordance with law. If I believed otherwise, I would have fired him." (Tr. 371) Chief McMullen contends that it was the policy and custom of The Sansom Park Police Department and of him as Chief of Police always "to provide or get medical care whenever anyone needed it, and any departure from that rule would be a departure from established policy or custom. Our personnel could not always treat an injury,

which is why medical help was to be summoned immediately when a need for it became known." (Tr. 371-372)

On the night of May 14, 1987, Sgt. Haynes was reviewing features of Reserve Officer badges with Officer Harold Jennings. (Tr. 360) Reserve Officer Lovelady was writing a report at the booking table on a person he had placed in jail when Sgt. Haynes first saw him that evening. (Tr. 360-361) The totality of the circumstances confronting Sgt. Haynes can be reviewed adequately only by the detailed account contained in his affidavit. See Appendix "A".

SUMMARY OF ARGUMENT

1. Sergeant Edward D. Haynes - Sergeant Haynes acted in defense of Reserve Officer Lovelady and subsequently initially in defense of other third persons as well as himself in firing at Bradley Peelman. Sgt. Haynes immediately summoned medical help for Bradley Peelman and was not consciously

indifferent to any serious medical needs. Sgt. Haynes did not violate any law which was clearly established at the time. There is either no probative evidence or is insufficient probative evidence to the contrary of the foregoing. Therefore, Sgt. Haynes is entitled to his qualified immunity from suit and is entitled to summary judgment, under the circumstances.

2. (Former) Chief McMullen- There is no probative evidence that former Chief McMullen through final policymaking authority to do so officially adopted or promulgated any actionable policy or permitted the existence of any actionable custom which proximately caused Bradley Peelman to be deprived of any constitutional right. There is no probative evidence that any pre-employment investigation by The City of Sansom Park developed any adverse information about Sgt. Haynes toward which Chief McMullen could have been consciously indifferent.

There is no probative evidence that Sgt. Haynes was inadequately trained, supervised and disciplined by former Chief McMullen. There is no probative evidence of any conduct on the part of Sgt. Haynes as a Reserve Officer and later as a full-time employee of the City of Sansom Park which suggested that Sgt. Haynes was not fit for duty toward which Chief McMullen could have been consciously indifferent. There is no probative evidence that the event in question was anything other than a single or isolated event. Therefore, for any one or more of the foregoing reasons, former Chief McMullen is entitled to his qualified immunity from suit and to summary judgment.

3. The City of Sansom Park - There is no probative evidence that The City of Sansom Park through anyone having final policymaking authority to do so officially adopted or promulgated any actionable policy or permitted the existence of any

actionable custom which proximately caused Bradley Peelman to be deprived of any constitutional right. There is no probative evidence of any actionable policy or custom of The City of Sansom Park toward investigating, hiring, training, supervising and disciplining. There is no probative evidence that the alleged event was other than a single or isolated event. There is no probative evidence or there is insufficient probative evidence that either Sgt. Haynes and former Chief McMullen both acted in their discretionary capacities. Therefore, for any one or more of the foregoing reasons, The City of Sansom Park is entitled to summary judgment as a matter of law.

4. All Defendants - Bradley Peelman was the proximate cause of his own harm, for which Defendants cannot be liable, and further and in any event, none of the

Defendants can be liable to Plaintiffs for either negligence or gross negligence.

REASONS FOR GRANTING THE PETITION

I. ARGUMENT AND AUTHORITIES

Several controlling points of law which are common to the positions of all Defendants first will be dicussed before each of the separate Issues I through IV are discussed separately:

A.

Controlling Common Points

1. Not All Claims Are Actionable Under The Federal Civil Rights Act It is well settled that not every alleged tort or alleged wrong constitutes a violation of a civil right. Green v. McKaskle, 788 F.2d 1116 (5th Cir. 1986); Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977); Wells v. Ward, 470 F.2d 1185 (10th Cir. 1982); and Carter v. Chief of Police, 437 F.2d 413 (3rd Cir. 1971). The Federal Civil Rights

Act cannot be used as a jurisdictional subterfuge for traditional lawsuits. Lopez v. Luginbill, 483 F.2d 486 (10th Cir. 1972).

2. Negligence And Gross Negligence Claims Are Not Actionable Under The Federal Civil Rights Act It is because quantitatively so many of the claims alleged in the Complaint (Tr. 1-13) and in the Supplemental Complaint (Tr. 140-146) are or appear to be grounded in negligence[1] and

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[1] Many of the allegations of Plaintiffs are stated in terms of "**failed**" and "**knew or should have known**". An allegation of a mere **failure** to do something connotes only negligence. Vargas v. The City of San Antonio, 650 S.W.2d 177 (Tex.App. 1983, no writ history); Burgamy v. Lawrence, 480 S.W.2d 38 (Tex.Civ.App. 1972, no writ history); and Texas & P.Ry.Co. v. Salazar, 458 S.W.2d 116 (Tex.Civ.App. 1970, writ refused, n.r.e.). The same connotation likewise generally follows from the term "**knew or should have known**". See Newton v. General Manager of Scurlock's Supermarket, 546 S.W.2d 76 (Tex.Civ.App. 1976, no writ history); Flanary v. Terry Farris Stores, Inc., 438 S.W.2d 864 (Tex.Civ.App. 1969, no writ history); Safeway Stores, Inc. v. Bozeman, 394 S.W.2d 532 (Tex.Civ.App. 1966, writ refused, n.r.e.); Henderson v. Pipkin Grocery Company, 268 S.W.2d 703 (Tex.Civ.App. 1954, writ dismissed); and Smith v. Safeway Stores, 167 S.W.2d 1044 (Tex.Civ.App. 1943,

gross negligence that the observation is made at the outset that neither negligence, Davidson v. Cannon, 474 U.S. 344 (1986), Daniels v. Williams, 474 U.S. 327 (1986), and Whitley v. Albers, 475 U.S. 312 (1986) nor gross negligence, Goka v. Bobbitt, 862 F.2d 646 (7th Cir. 1988), Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988), and Wilson v. City of North Little Rock, 801 F.2d 316 (8th Cir. 1986) are actionable under The Federal Civil Rights Act; therefore, all claims which are asserted under The Federal Civil Rights Act and which appear to be grounded in either negligence or gross negligence must be dismissed.

3. Proximate Causation Required

Proof of causation is an indispensible element necessary to support a claim under The Federal Civil Rights Act. Monell v. New York City Department of Social Services,

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no writ history).

436 U.S. 658 (1978). If the Court concludes that there is either no probative evidence or insufficent probative evidence or insufficient probative evidence of any harm resulting to Bradley Peelman other than through his own conduct, all claims must be dismissed.

4. General Summary Judgment Principals - Burden The United States Supreme Court in 1986 reinterpreted Federal Rule of Civil Procedure 56 (the summary judgment rule) to place the burden on the nonmoving party to demonstrate the existence of a genuine issue of material fact or to demonstrate otherwise as a matter of law why a moving party is not entitled to summary judgment.

In Celotex Corporation v. Catrett, 477 U.S. 317, 325 (1986), the Court said:

> "[T]he burden is [not] on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead . . . the burden on the moving party may be discharged by

> 'showing' - that is, pointing out to the District Court - that there is an absence of evidence to support the nonmoving party's case."

and at Page 274 further stated:

> ". . . Rule 56(e) requires the nonmoving part to go beyond the pleadings and by [such party's] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, 'designate 'specific facts showing that there is a genuine issue for trial'."

See also Slaughter v. Allstate Insurance Company, 803 F.2d 857 (5th Cir. 1986).

Defendants hereafter undertake to discuss any remaining claims in terms of those summary judgment principles but respectfully submit that they further have adduced probative proof to the contrary of the allegations made by Plaintiffs in their Complaint (Tr. 1 - 13) and in their Supplemental Complaint (Tr. 140-146) and that the documents submitted by Plaintiffs in opposition to the Motion of Defendants For Summary Judgment do not constitute probative evidence necessary to establish

every element of their claims, as a result of which Defendants are entitled to summary judgment.

II. DISCUSSION OF ISSUES

A. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT POSSESSED JURISDICTION TO CONSIDER PETITIONERS INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION?

B.

Discussion of Issues

1. **Appellate Jurisdiction** Defendants respectfully assert that no material issue of fact is in dispute. The lower Court's denial of Summary Judgment on the basis of qualified immunity is, therefore, an appealable "final decision". Mitchell v. Forsyth, 472 U.S. 511, 530 (1984). The Appellate Court's Order, therefore, deals with a controlling question of law, and it is immediately appealable without reference to 28 U.S.C. §1292(b) (1989). Id.

The undisputed facts indicate that Defendant City and Former Chief McMullen

promulgated the policies requiring compliance with state and federal laws as well as certification of its police officers. The undisputed perception of Sgt. Haynes depicts a serious situation requiring his immediate intervention and use of deadly force. These facts are not in dispute. Said facts also confirm Petitioners' compliance with the laws. Consequently, there is no issue of fact precluding the immediate Interlocutory Appeal of the lower courts "final decision" with regard to qualified immunity. See, Mitchell v. Forsyth, 472 U.S. 511, 530 (1984); Feagley v. Waddill, 868 F.2d 1437, 1429 (5th Cir. 1989).

B. WHETHER RESPONDENTS ADDUCED PROBATIVE EVIDENCE SUFFICIENT TO OVERCOME THE SUMMARY JUDGMENT PROOF IN SUPPORT OF THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT FOR SANSOM PARK POLICE SERGEANT EDWARD D. HAYNES THAT HE DID NOT VIOLATE ANY LAW THAT WAS CLEARLY ESTABLISHED AT THE TIME OR, IN THE UNLIKELY EVENT THAT HE DID SO, HE DID SO UNDER SUCH EXTRAORDINARY CIRCUMSTANCES THAT HE NEITHER KNEW NOR SHOULD HAVE KNOWN THAT HE WAS VIOLATING LAW THAT WAS CLEARLY ESTABLISHED AT THE TIME.

1. Qualified Immunity An individual defendant who is a governmental official is entitled to qualified immunity not only from liability but also from suit Jacquez v. Procunier, 801 F.2d 789 (1986), unless he or she violated a law that was clearly established at the time. In Trejo v. Perez, 693 f.2d 482, 485 (5th Cir.1982), the United States Court of Appeals for the Fifth Circuit stated that:

> "The Court effectively created a two level progressive inquiry:
>
> (1) Was the law clearly established at the time? If the answer to this threshold question is no, the official is immune.
>
> (2) If the answer is yes, the immunity defense ordinarily should fail unless the official claims extraordinary circumstances and can prove that he neither knew nor should have known that his acts invaded well-settled legal rights."

2. Clearly-Established Law - Self Defense Section 9.31 of the Texas Penal Code provides that:

> (a) Except as provided in Subsection (b) of this section, a person is

justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

(b) The use of force against another is not justified:

(1) in response to verbal provocation alone;

(2) to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful, unless the resistance is justified under Subsection (c) of this section;

(3) if the actor consented to the exact force used or attempted by the other; or

(4) if the actor provoked the other's use or attempted use of unlawful force, unless:

(A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and

(B) the other nevertheless continues or attempts to use unlawful force against the actor.

(c) The use of force to resist an arrest or search is justified:

(1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

(d) The use of deadly force is not justified under this subchapter except as provided in Sections 9.32, 9.33, and 9.34 of this code."

3. Clearly-Established Law - Deadly Force in Defense of Person Section 9.32 of the Texas Penal Code provides that:

"A person is justified in using deadly force against another:

(1) if he would be justified in using force against the other under Section 9.31 of this code;

(2) if a reasonable person in the actor's situation would not have retreated; and

(3) when and to the degree he reasonably believes the deadly force is immediately necessary:

(A) to protect himself against the other's use or attempted use of unlawful deadly force; or

(B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery or aggravated robbery."

4. Clearly-Established Law - Defense of Third Person Section 9.33 of the Texas Penal Code provides that:

"A person is justified in using force or deadly force against another to protect a third person if:

(1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

(2) the actor reasonably believes that his intervention is immediately necessary to protect the third person."

5. Clearly-Established Law - Duty of Peace Officer As To Threats Article 6.05 of the Texas Code of Criminal Procedure provides that:

"It is the duty of every peace officer, when he may have been informed in any

> manner that a threat has been made by one person to do some injury to himself or to the person or property of another, including the person or property of his spouse, to prevent the threatened injury, if within his power; and, in order to do this, he may call in aid any number of citizens in his county. He may take such measures as the person about to be injured might for the prevention of the offense."

6. Clearly-Established Law - Peace Officer to Prevent Injury Article 6.06 of the Texas Code of Criminal Procedure provides that:

> "Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another, including the person or property of his spouse, or injure himself, it is his duty to prevent it; and, for this purpose the peace officer may summon any number of the citizens of his county to his aid. The peace officer must use the amount of force necessary to prevent the commission of the offense, and no greater."

7. Clearly-Established Law - Conduct of Peace Officer Article 6.07 of the Texas Code of Criminal Procedure provides that:

> "The conduct of peace officers, in preventing offenses about to be

> committed in their presence, or within their view, is to be regulated by the same rules as are prescribed to the action of the person about to be injured. **They may use all force necessary to repel the aggression."**[2]

8. Clearly-Established Law - Validity of Defense of Third Person To Be Determined From Standpoint Of Person Using Deadly Force To Protect Third Person The determination, of the circumstances which motivate a person to use deadly force to protect another, is judged upon the actor's reasonable belief of said circumstances, it is judged from the actor's standpoint and not that of others. Hughes v. State, 719 S.W.2d 560 (Cir.App., 1986).

9. Clearly-Established Law - Medical Needs No liability exists under The Federal Civil Rights Act for police-related injuries, unless there is (1) a **conscious or deliberate**

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[2] Unless otherwise specifically stated, emphasis by bold facing is that of authors.

indifference (2) **to a serious medical need.** Estelle v. Gamble, 429 U.S. 97 (1976).

10. Clearly-Established Law - Proximate Causation Proximate causation is an indispensable element of pleading and proof to establish liability on a damage claim under The Federal Civil Rights Act. Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

11. Clearly-Established Law-Reasonable Conduct of Officer On The Scene An officer using force is required to conduct himself as would a reasonable officer on the scene. Graham v. Connor, 109 S.Ct. 1865, 104 L.Ed.2d. 443, 57 U.S.L.W. 4513.

12. Conclusion Sgt. Haynes has adduced affirmative probative evidence that, from his viewpoint, it was immediately necessary for him to use deadly force to protect first Reserve Officer Lovelady and then others in the street as well as himself

under circumstances permitted by controlling statutory and case law and further that he was not consciously indifferent to any serious medical need of Bradley Peelman in light of the fact that he immediately summoned medical aid for Bradley Peelman. In so doing, he did not violate any law which was clearly established at the time, but in the unlikely event that he did so, he did so under such extraordinary circumstances that he neither knew nor should have known that he was violating any law which was clearly established at the time. Plaintiffs have failed to sustain their burden under Celotex of adducing probative evidence of every element of their claims against Sgt. Haynes. Therefore, Sgt. Haynes is entitled to his qualified immunity from suit and to summary judgment as a matter of law.

C. WHETHER RESPONDENTS ADDUCED PROBATIVE EVIDENCE SUFFICIENT TO OVERCOME THE SUMMARY JUDGMENT PROOF IN SUPPORT OF THE MOTION OF DEFENDANTS FOR SUMMARY

JUDGMENT FOR FORMER CHIEF OF POLICE KENNETH McMULLEN THAT HE DID NOT VIOLATE ANY LAW THAT WAS CLEARLY ESTABLISHED AT THE TIME OR, IN THE UNLIKELY EVENT THAT HE DID SO, HE DID SO UNDER SUCH EXTRAORDINARY CIRCUMSTANCES THAT HE NEITHER KNEW NOR SHOULD HAVE KNOWN THAT HE WAS VIOLATING LAW THAT WAS CLEARLY ESTABLISHED AT THE TIME.

D. WHETHER RESPONDENTS ADDUCED PROBATIVE EVIDENCE SUFFICIENT TO OVERCOME THE SUMMARY JUDGMENT PROOF IN SUPPORT OF THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT FOR THE CITY OF SANSOM PARK THAT IT HAD NO ACTIONABLE POLICY OR CUSTOM WHICH WAS THE PROXIMATE CAUSE OF ANY DEPRIVATION OF A CONSTITUTIONAL RIGHT OF BRADLEY PEELMAN AND RESPONDENTS.

Issues C. and D. will be discussed together because of a number of concepts which are common to both, with appropriate distinctions being made.

1. Qualified Immunity The same concept of qualified immunity which is applicable to Sgt. Haynes is applicable to Chief McMullen as well.[3]

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3 The concept of qualified immunity available to an individual defendant official or officer is discussed in Paragraph 1 at Page 30.

2. No Vicarious Liability Personal involvement is the hallmark of liability on a claim asserted against a governmental official or officer under The Federal Civil Rights Act. Meehan v. County of Los Angeles, 856 F.2d 102 (9th Cir. 1988); Wilkins v. Whittaker, 714 F.2d 4 (4th Cir. 1983); Wilson v. City of North Little Rock, 801 F.2d 316 (8th Cir. 1986); Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980) certiorari denied 101 S.Ct. 399; Reeves v. Jackson, 608 F.2d 644 (5th Cir. 1979); Knipp v. Weikle, 405 F. Supp. 792 (Ohio 1975); Love v. Davis, 353 F.Supp. 587 (La. 1972); Franburg v. City of Chattanooga, 330 F.Supp. 1047 (Tenn. 1968); and Sanberg v. Daley, 306 F.Supp. 277 (Ill. 1969). Accordingly, neither a municipality nor its officials have vicarious liability under any theory of respondeat superior on a claim asserted under The Federal Civil Rights Act. Monell v. New York City Department of Social

Services, supra; Wood v. Sunn, 865 F.2d 982 (9th Cir. 1988); Scofield v. City of Hillsborough, 862 F.2d 759 (9th Cir. 1988); Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988); and Wilson v. City of North Little Rock, supra.

3. Liability of Supervisory Personnel

To establish liability under The Federal Civil Rights Act against any particular official of a municipality for the conduct of one of its officers, the burden is that of the plaintiff conjunctively to establish, inter alia, that (1) the official had personal responsibility for the conduct of the officer, Johnson-El v. Schoemehl, 878 F.2d 1043 (8th Cir. 1989); (2) the official must have knowingly in the actual or prospective (foreseeable) sense deprived the plaintiff of a constitutional right, Baker v. McCollin, 443 U.S. 137 (1979) and Daniel V. Ferguson, 839 F.2d 1124 (5th Cir. 1988); and (3) the conduct of the officer

must involve something more than a single or isolated event, Fargo v. City of San Juan Bautista, 857 F.2d 638 (9th Cir. 1988); and Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983).

4. Liability Against a Municipality Liability can be established against a municipality under The Federal Civil Rights Act, if, but only if, a person's constitutional or civil rights are violated by or because of:

(1) A policy statement, ordinance, regulation, or decision that is officially adopted or promulgated by either:

(a) The municipality's lawmaking officials (i.e., as a body) or

(b) An official to whom the lawmakers of the municipality (i.e., as a body) have delegated final decision-making authority or

(c) An official who is empowered by

state law to make final policy and decisions for the municipality, **and**

(d) The official who takes the action must be the official who has final authority to do so; **or**

(2) A persistent widespread custom or practice of municipal officials or employees, which, although not authorized by officially-adopted or promulgated policy, is so common and well settled as to constitute a custom which fairly represents municipal policy, nothing that (a) liability cannot be established under this concept for a single act or occurrence, because a single act or occurrence does not constitute a persistent, widespread custom or practice and further noting that (b) liability cannot be established under this concept based upon the isolated event made the basis of the instant lawsuit. See City of St. Louis v. Praprotnik, 485 U.S. 112, 99 S.Ct. 107 (1988); Monell v. New York City Department

of Social Services, supra; Pembaur v. Cincinnati, 475 U.S. 469 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985); Rodriquez v. Avita, 871 F.2d 552 (5th Cir. 1989); Davis v. City of Ellensburg, 869 F.2d 1230 (9th Cir. 1989); Fargo v. City of San Juan Bautista, supra; Ramie v. City of Hedwig Village, 765 F.2d 490 (5th Cir. 1985); Bennett v. City of Slidell, 735 F.2d 861 (5th Cir. 1984); Languirand v. Hayden, supra; and Johnson v. Panizzo, 664 F.Supp. 336 (D.C. Ill. 1987).

An actionable policy, custom, or practice cannot be established against a municipality by mere conclusory allegations but must be supported by allegations of a factual nature. Durkin v. Bristol Township, 88 F.R.D. 613 (Pa. 1980).

Even whenever a municipality does have an actionable policy or custom, the municipality still does not have liability therefor, if the official or officer acting

for the municipality did not violate a constitutional right. City of Los Angeles v. Heller, 475 U.S. 796 (1986).

A municipality cannot be vicariously liable for the acts of its employees or agents under any theory of respondeat superior. Monell v. New York City Department of Social Services, supra[4], or for certain discretionary acts of its personnel. City of St. Louis v. Praprotnik, supra.

5. Liability for Training The United States Supreme Court ruled in Canton

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[4] Defendants observe that based upon prior filings in this lawsuit, it is anticipated that Plaintiffs will take the position in reliance on McKee v. City of Rockwall, 977 F.2d 409 (5th Cir. 1989) that The City of Sansom Park as a municipality does not have an immediate right of interlocutory appeal upon a denial of its summary judgment motion; however, Defendants further observe that the United States Court of Appeals for the Fifth Circuit in McKee stated that it could not expand the parameters of its jurisdiction in the absence of "a signal" from the United States Supreme Court. The final disposition in McKee may have an impact on the question of the right of The City of Sansom Park to take an interlocutory appeal in this case.

v. Harris, 489 U.S. 378, 103 L.Ed. 2d 412 (1989) that liability for inadequate police training (1) cannot exist in the absence of a violation of a constitutional right; (2) cannot exist in the absence of a direct causal link between a municipal policy or custom, on the one hand, and the alleged constitutional deprivation, on the other hand; (3) can exist only in "limited circumstances"; (4) can exist only if the training is inadequate and it can be said to represent 'city policy'; (5) cannot be based upon unsatisfactory training of a particular officer, since an officer's shortcomings may have resulted from factors other than a faulty training program; (6) cannot be based upon mistakes made occasionally by adequately-trained officers, since the fact that trained officers occasionally make mistakes "says little about the training program"; (7) cannot be based upon a finding that the municipality

acted recklessly, intentionally, or with gross indifference, because that test is overly broad; (8) can be based only upon a determination that the inadequacy of training results from a deliberate indifference to constitutional rights; and (9) the policy or custom of deliberate indifference must result from the need for more or different training being so obvious and the inadequacy being so unlikely to result in the violation of constitutional rights that the policymakers of the municipality can reasonably be said to have been deliberately indifferent to a need. See also Rodriquez v. Avita, supra.

6. Conclusion The affirmative and probative evidence of the City of Sansom Park and Chief McMullen is that they had fixed policies and customs of requiring that their police personnel (including Sgt. Haynes) be investigated before being hired, that they be properly trained in the law

and in police procedures, that they be properly supervised and disciplined, and that they secure medical care for others when needed; that nothing adverse about Sgt. Haynes as a police officer toward which Chief McMullen could have been consciously indifferent came to his attention before or during the full-time employment of Sgt. Haynes with the Sansom Park Police Department; that the event involved with this lawsuit is the only one in which Sgt. Haynes has used deadly force; and that the event made the basis of this lawsuit is a single or isolated event not only for Sgt. Haynes but also for Chief McMullen. The affirmative and probative evidence is that The City of Sansom Park and Chief McMullen established lawful policies and customs designed to accord citizens their constitutional rights, not to deprive them of those rights. The affirmative and probative evidence further is that Chief

McMullen violated no law which was clearly established at the time, but in the unlikely event that he did so, he did so under such extraordinary circumstances that he neither knew nor should have known that he was violating any law which was clearly established at the time. Plaintiffs, on the other hand, have failed to adduce affirmative and probative evidence necessary to sustain every element of their claims against The City of Sansom Park and Chief McMullen. Therefore, Chief McMullen is entitled to his qualified immunity from suit and to summary judgment, and The City of Sansom Park is entitled to summary judgment.

C.

Dismissal of Pendant Claims

Upon dismissal of all purported claims asserted by Plaintiffs in their Complaint under the Federal Civil Rights Act, the Federal Courts should not retain jurisdiction

over, but should dismiss, any pendent state tort claims. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1986); Jacquez v. Procunier, 801 F.2d 789 (5th Cir. 1986); and Trans Source International v. Trinity Industries, Inc., 725 F.2d 274 (5th Cir. 1984).

CONCLUSION

Therefore, the Order of the United States District Court dated May 3, 1989, and filed May 4, 1989, (Tr. 748) should be reversed, and Judgment should be rendered that Plaintiffs take nothing by way of this lawsuit.

PRAYER

WHEREFORE, PREMISES CONSIDERED, The City of Sansom Park, Texas, former Chief of Police Kenneth McMullen and Sergeant Edward D. Haynes, who are Defendants/Petitioners, respectfully pray that the Order of the United States District Court dated May 3, 1989, and filed May 4, 1989, be reversed and that Judgment be rendered by the United States Supreme Court that Plaintiffs/ Respondents take nothing by way of this lawsuit.

Respectfully submitted,

LUDLUM & LUDLUM

BY:_____

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Attorneys and Counsel of Record For Edward D. Haynes, Defendant/Petitioner

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been mailed via certified mail, return receipt requested or hand delivered to the following attorneys of record on this the _____day of _____, 1990.

Mr. Don Gladden
Law Offices of Don Gladden
P.O. Box 50686
Fort Worth, TX 76105

_____
JAMES LUDLUM, JR.

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE CITY OF SANSOM PARK, TEXAS, ET AL,
Petitioners/Defendants,

v.

DANA PEELMAN, ET AL
Respondent/Plaintiff.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DANA PEELMAN, ET AL.	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. 4-87-368-E
CITY OF SANSOM PARK, TEXAS, ET AL.	§	

O R D E R

As genuine issues of material fact are adequately raised by the pleadings in this cause and controverted by the development of significant probative evidence as to each element of the Plaintiff's various claims, the Defendants' motion for summary judgment is DENIED.

Signed this 3rd day of May, 1989.

/Eldon B. Mahon
ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

APPENDIX B
B-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1458

DANA PEELMAN, Individually and as Next Friend for MATTHEW PEELMAN, A Minor, and as Community Survivor of the Estate of BRADLEY PEELMAN, Deceased,

Plaintiff, Appellee,

versus

CITY OF SANSOM PARK, TX, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(February 28, 1990)

Before REAVLEY, KING and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/Carolyn Denien King
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1458
Summary Calendar

DANA PEELMAN, Individually and as Next Friend for MATTHEW PEELMAN, A Minor, and as Community Survivor of the Estate of BRADLEY PEELMAN, Deceased,

Plaintiff-Appellee,

v.

CITY OF SANSOM PARK, TX, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas
(CA-4-87-368-"E")

(January 26, 1990)

Before REAVLEY, KING and JOHNSON, Circuit Judges.

PER CURIAM: *

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Defendants-appellants, City of Sansom Park, et al. (the defendants), appeal from the denial of their joint motion for summary judgment. We decline to address the merits of their appeal because we lack jurisdiction to hear this case.

I.

Briefly stated, plaintiffs-appellees, Dana Peelman, et al. (Peelman), brought this action asserting claims under 42 U.S.C. §§ 1983 and 1988 and pendent state law claims. The action arises out of the May 14, 1987, shooting death of Bradley Peelman by Officer Edward D. Haynes (Officer Haynes) of the City of Sansom Park Police Department.

Defendants filed a joint motion for summary judgment on April 14, 1989, claiming, among other things, qualified immunity. The district court denied defendants' motion for summary judgment on May 3, 1989, stating:

> As genuine issues of material fact are adequately raised by the pleadings in this cause and controverted by the development of significant probative evidence as to each element of the Plaintiff's various claims, the Defendants' motion for summary judgment is DENIED.

Defendants timely filed this appeal, raising numerous grounds. Defendants brought this appeal as an interlocutory appeal pursuant to 28 U.S.C. §1292. However, we also consider jurisdiction under 28 U.S.C. §1291.

II.

In Mitchell v. Forsyth, the Supreme Court held that to the extent that a district court's denial of an individual officer's claim of qualified immunity turns on an issue of law, it is an appealable "final decision" within the meaning of 28 U.S.C. § 1291[1] -- despite the absence of a final

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[1] Section 1291, entitled "Final decisions of district courts," provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final

judgment. 472 U.S. 511, 530 (1984). In reaching this result, the Court applied the "collateral order" doctrine. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). Under the collateral order doctrine, the court of appeals is vested with jurisdiction under § 1291 even though the district court has not rendered the "last order possible to be made in a case." Mitchell, 472 U.S. at 524. The doctrine provides that an appeal under § 1291 is permissible only with respect to a decision that conclusively

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> decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291.

determines the disputed question and involves a claim "of right separable from, and collateral to, rights asserted in the action." Id. at 524-25.

At issue in Mitchell was a pure question of law. Id. at 528 n.9. Under the law existing in 1972, warrantless wiretaps aimed at gathering intelligence regarding a domestic threat to national security were clearly illegal. United States vs. United States District Court, 407 U.S. 297 (1972) (Keith). But the question presented was whether the illegality of such wiretaps was clearly established at the time of the defendant's acts in November of 1970, over one year before Keith was decided. To answer that question, the Court had only to arrive at a legal conclusion whether the illegality of warrantless domestic-threat-based wiretaps was clearly established in 1970. Mitchell, 472 U.S. at 530.

Given the legal character of the issue raised, the Court had no trouble determining that the collateral order doctrine was satisfied in that case. Id. at 529. The Court went on to conclude that immediate appealability was essential for the preservation of the essence of qualified immunity (and satisfied the collateral order doctrine) where the reviewing court was called upon to consider

> a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct clearly violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Id. at 528. However, the Court emphasized that a denial of summary judgment on the basis of qualified immunity is an appealable "final decision" only "to the extent that [the district court's denial] turns on an

issue of law." Id. at 530. Consistent with this limitation, we have held that "if disputed factual issues material to immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable." Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989).

In the instant case, the defendants do not contend that under the facts as alleged by Peelman, qualified immunity is present. In the defendants' joint motion for summary judgment before the district court, they stated the undisputed facts to be:

> (1) Bradley Peelman ran his truck through the front yard and crashed into the front porch of a home on the night of Thursday, May 14, 1987.
>
> (2) Bradley Peelman was shot by Officer Haynes shortly thereafter.
>
> (3) Bradley Peelman died.

They candidly conceded that "[w]ith little or minor exception, all other facts are in dispute . . . ." Defendants asserted that they were entitled to summary judgment

because Peelman's facts were "[b]roadly summarized" and lacked "factual detail and particularity."

The district court did not consider whether the plaintiffs' allegations, if true, established immunity for the defendants. Nor did the district court hold that qualified immunity was absent, even under the defendants' version of the facts. Rather, the district court held that there was a genuine controversy over the underlying facts, and that the existence of qualified immunity turned on those issues of fact, not law.

This is exactly the type of case held unappealable in Feagley. Under Peelman's version of the facts, Brad Peelman lost control of his automobile and struck a house a short distance from the road. As he attempted to move his vehicle from the yard he was repeatedly fired upon by Officer Haynes. The officer had no provocation for

the shooting. Brad Peelman was then allowed to bleed to death despite readily available emergency medical staff across the street. Under the defendants' version of the facts, as Brad Peelman backed his car out of the yard, Officer Haynes ordered him to stop his vehicle. However, Brad Peelman did not heed Officer Haynes warnings, and the officer was forced to fire shots in order to protect other officers and members of the public who were about to be run over by the vehicle. Officer Haynes then immediately called an ambulance. By the defendant's own admission, the facts of this case are almost entirely in dispute.[2] The issue of immunity turned on these disputed factual issues. Therefore, the instant order denying the defendants' joint

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[2] Our portrayal only includes a few of the numerous factual disputes over the claims of Peelman.

motion for summary judgment does not fit within the collateral order doctrine.[3]

The defendants have asserted throughout this appeal that this court has jurisdiction pursuant to 28 U.S.C. § 1292.[4] Thus, we

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[3] Of course, we have no jurisdiction to hear the City of Sansom Park's appeal in any event. McKee v. City of Rockwall, 877 F.2d 409 (5th Cir. 1989), cert.denied, 1990 U.S. LEXIS 41 (1990) (Mitchell does not extend to municipalities).

[4] Section 1292 provides, in relevant part:

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such

briefly examine whether the defendants' asserted basis for jurisdiction allows us to consider this case. We conclude that it does not.

The only possible ground for jurisdiction under defendants' asserted

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district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such an order. The Court of Appeals which should have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order:
Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.
28 U.S.C. §§ 1292 (a), (b).

basis is to be found in § 1292(b). However, the Supreme Court has noted that the discretionary power to permit appeal under §1292(b) "is not, in the first instance, vested in the court of appeals." Coopers v. Lybrand, 437 U.S. at 474. Rather, the litigant seeking review of a nonfinal order "must first obtain the consent of the trial judge." Id. Defendants have not sought application to certify this appeal as required by § 1292(b). Instead, the defendants filed a self-serving "Notice of Immediate Interlocutory Appeal." This notice is insufficient because written consent of the district court, a prerequisite to appellate jurisdiction under § 1292(b), is absent. The Supreme Court has emphasized that the consent of the district court is not a ritualistic act: "This screening procedure serves the dual purpose of ensuring that such review will be confined to appropriate cases and avoiding time-consuming

jurisdictional determinations in the court of appeals." Id. at 474-75. Thus, we conclude that we lack jurisdiction to hear this appeal.

APPEAL DISMISSED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DANA PEELMAN, ETC.	§	
	§	
v.	§	CIVIL ACTION
	§	NUMBER CA 4 87 368 E
CITY OF SANSOM PARK, ET AL	§	
	§	

STATE OF TEXAS	§	
	§	
COUNTY OF TARRANT	§	

BEFORE ME, the undersigned authority, on this date personally appeared Edward Deon Haynes, who is well known to me and who, after having been first duly sworn by me under oath, stated and deposed that:

"My name is Edward Deon Haynes. I am a resident of Tarrant County, Texas. I have never been convicted of any felony crime or crime involving moral turpitude. I understand the oath to tell the truth and the pains and penalties for perjury.

"I am a defendant in a lawsuit called Dana Peelman, Individually And As Next

Friend For Matthew Peelman, A Minor, And As Community Survivor Of The Estate of Bradley Peelman, Deceased v. City of Sansom Park, Sgt. Edward D. Haynes and Kenneth McMullen, Chief of Police- Civil Action No. CA 4-87-368-E - In The United States District Court For the Northern District of Texas - Fort Worth Division. I understand that the City of Sansom Park and Kenneth McMullen are Defendants along with me in that lawsuit. I understand that that lawsuit arises out of the death of Bradley Peelman on May 14, 1987.

"By way of some background about me, I graduated in 1979 from Richland High School in North Richland Hills, Texas. I attended TCJC Northeast Campus for three hours before going to the Regional Police Academy which was held on the Northeast Campus of Tarrant County Junior College (TCJC). After successfully

completing the 360-hour course at the Regional Police Academy that was held on the Northeast Campus of TCJC, I received a basic police officer's certificate and after successfully completing a psychological examination required by the State of Texas, I received my certification as a law enforcement and peace officer from the Texas Commission on Law Enforcement Standards and Education, a state agency. I received that certification in 1984.

"At the Regional Police Academy, I received both classroom and in-the-field training. During my training at the Regional Police Academy, I received written materials and classroom instruction covering The Texas Code of Criminal Procedures and The Texas Penal Code.

"Section 9.33 of the Texas Penal Code was the same then that it was on May 14,

1987. It said that a person was justified in using force or deadly force against another person to protect a third person, if the person using the force or deadly force reasonably believed that his intervention was immediately necessary to protect the third person and if under the circumstances as the person using the force or deadly force reasonably believed the circumstances to be he would be justified under Section 9.31 or 9.32 of the Texas Penal Code in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believed to be threatening the third person he was seeking to protect.

"Section 9.31 of the Texas Penal Code pertains to self defense and says that a person is justified in using force against another person when and to the degree he reasonably believes the force

is immediately necessary to protect himself against the use or attempted use of unlawful force by another person. The use of force against another is not justified in response to verbal provocation alone or for a person to resist an arrest or search that he knows is being made by a peace officer or by one at his direction or if the person consented to the exact force used or attempted or if the person provoked the other's use or attempted use of unlawful force (unless the person abandons the encounter or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter and the other still continues or attempts to use unlawful force against him), and the use of force to resist an arrest or search is justified if before the person offers resistance the peace officer uses or attempts to use greater

force than is necessary to make the arrest or search and when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's or the person's use or attempted use of greater force than necessary. Under Section 9.31 of The Texas Penal Code, the use of deadly force is not justified, except as provided in Sections 9.32, 9.33 and 9.34 of The Texas Penal Code.

"Section 9.32 of The Texas Penal Code provides that a person is justified in using deadly force against another, if he would be justified in using force against the other person under Section 9.31 of The Texas Penal Code and if a reasonable person in his situation would not have retreated and when and to the degree he reasonably believes the deadly force is immediately necessary either to protect himself against the use or

attempted use of unlawful deadly force by the other person or to prevent another from his immediate commission of aggravated kidnapping, murder, rape, aggravated rape, robbery or aggravated robbery.

"Section 9.34 of The Texas Penal Code actually covers two situations. A person is justified in using non-deadly force when and to the degree he reasonably believes it is immediately necessary to prevent the other from suicide or inflicting serious bodily injury to himself. The other is that a person is justified in using force or deadly force against another when and to the degree he reasonably believes the force or deadly force is immediately necessary to preserve the other's life in an emergency.

"Article 6.05 of The Texas Code of Criminal Procedure says that it is the duty of every peace officer when he may

have been informed in any manner that a threat has been made by one person to do some injury to himself or to the person or property of another to prevent the threatened injury, if within his power.

"Article 6.06 of The Texas Code of Criminal Procedure says that whenever one person is within the presence of a peace officer or within his view and is about to commit an offense against the person or property of another or injure himself, it is his duty to prevent it and that the peace officer must use the amount of force necessary to prevent the commission of the offense, and no greater.

"Article 6.07 of The Texas Code of Criminal Procedure says that the conduct of peace officers in preventing offenses about to be committed in their presence or view is to be regulated by the same rules as are prescribed for the action of the person about to be injured and

that peace officers may use all necessary force to repel the aggression.

"That was the law as it existed on May 14, 1987 in regards to the force or deadly force you can use against another person to protect a third person. I knew that after I had finished my training at the Regional Police Academy. I knew it on May 14, 1987. I know it now. That's the law. It seems clear.

"During the entire time I worked at the Sansom Park Police Department, Kenneth McMullen was the Chief of Police. During that entire time, it was always his policy and his standing order to follow and obey all of the laws of the State of Texas and of the United States. That was the policy of The City of Sansom Park and of its City Council. That was always the policy and custom of The City of Sansom Park and of Chief of Police Kenneth McMullen, and he enforced

that policy and custom with discipline if there was ever a breach of it.

"The City of Sansom Park and Chief McMullen encouraged regular review of The Texas Penal Code and The Texas Code of Criminal Procedure and additional training. The City of Sansom Park paid for additional training for me after I became employed there. I have been through Crime Scene Search School for forty hours. I went to the Texas War On Drugs at the Amon Carter Museum in Fort Worth. I attended another training session on Family Sexual Crisis at the TCJC Northeast Campus. I paid my own way to that.

"We had in-house and in-service training as well.

"I worked for North Richland Hills Police Department for about seven months then I became employed by the Sansom Park Police Department. For about two

years prior to May 14, 1987, I had worked for the City of Sansom Park. I usually worked the streets on patrol. I enjoyed working in Sansom Park. I liked it, because it is a small community where you get to know a lot of the citizens.

"My normal shift on May 14, 1987, was 8:00 p.m. to 4:00 a.m. It was a Thursday evening. Nothing out of the ordinary had happened in my life that day. I was wearing the traditional uniform of a Sansom Park Police Officer. It consisted of the traditional navy blue pants, the navy blue shirt, black boots and straw western hat. I wore a badge, the insignia of my rank as Sergeant and a government model .45 caliber pistol. The last time I had gone to the firing range before that day was about three or four weeks before.

"I had two Police Officers under my command that night. They were Roy Lovelady and Jerry Stafford. Roy Lovelady was a Reserve Officer. Jerry Stafford was a paid full-time city employee Police Officer. I had worked with Officer Lovelady basically twice a week.

"Upon arriving at the station at 7:45 p.m on May 14, 1987, I checked out the jail area, gathered up my books, went to the patrol car, made a residential drawing, checked out the city, and talked to some Sansom Park Police Officers, including Lieutenant Couldron and Officer Harold Jennings. I advised Officer Jennings that badges for Reserve Officers had come in. He was excited.

"So, we drove back to the Sansom Park Police Department after Lieutenant Couldron called the dispatcher and advised her I could have the keys to his

office, so Officer Jennings and I could look at the badges.

"We arrived back at the Sansom Park Police Department at about 9:45 p.m. The dispatch is a small area room with one dispatcher having a radio and computer screens to look at. I had worked with the dispatcher that was on duty that night. It was Bess Falk. We had gotten permission to get the keys from the dispatcher. She gave me the keys. I opened up the Lieutenant's office and removed the badges from his office. Officer Harold Jennings and I went back to the patrol room area and went into my office and started looking at the badges and discussing various things about the badges. The first time I had seen Officer Lovelady that night, he was sitting at the booking table. He had already placed a person in jail and was writing his report.

"During the time Officer Jennings was in the office with me, I heard a beep and then my dispatcher came over the radio and said, "We need police officers out front immediately." Harold and I jumped up. The Sansom Park City Council had been in session in City Hall. Sansom Park City Hall and the Sansom Park Police Department are all in the same small building. I thought there might be trouble because of the City Council meeting.

"We proceeded out through my office door. At that time, Officer Lovelady had gotten up from the desk and gotten in front of me. We went down a hallway down to the jail and up towards the dispatch office and out the front door. Officer Lovelady was in front of me.

"He went through the main door by the front window of the dispatch office. I came out right behind him. I looked at

the dispatcher and asked her, "What's going on?" She said, "There out front." I immediately went out behind Officer Lovelady. At that time, I observed various City Council Members and I saw City Councilman George Zeman right to my left. I asked him, "What's going on?" He pointed across the street and said, "There he is."

"I looked across the street. I observed a truck in a forward and backward motion and could hear crashing sounds. I saw this truck running into a home across the street. Mrs. Bowman and her two children lived there. Her house was right across the street from the Police Station. She is a single parent.

"I did not recognize that truck as being one I was familiar with. Being a Police Sergeant in Sansom Park, I knew most of the regular vehicles in that community.

It is a small community. That truck was not one I recognized.

"At the time George Zeman pointed over to the house, I had observed this truck going in a backwards and forward motion. I could hear a crashing sound up at the front of the house. Every time the truck went forward, it made a crashing sound.

"Officer Lovelady ran across the street. Then I was up with him. Officer Jennings was off duty but he was with us. We were close enough to observe what this man was doing. He was in the yard, obviously ramming the truck forward. We're hollering for him to stop. We're yelling, "Stop, Police Officers!" All three of us were hollering that. Officer Lovelady had a bellowing voice, he's real large, and anybody could hear him. At that time, he was going over near the

which signified a backup white light on the rear, this truck was coming out of the yard. I yelled at Officer Lovelady to get back over away from the truck because the truck was coming out. He moved. The truck hit a bush with the right front wheel and come up over the bush and on to the pavement. At this time, I'm coming around the front of the truck where I can get closer to the driver. The back window was tinted and I couldn't see in his truck, so I didn't know who he was.

"We have a street light that has a tree overhanging and illuminates just very little and only part of the street. I could see that it was a truck. The truck was moving. It had still remained at a very high RPM rate of speed. The tires were spinning and throwing gravel. It had been throwing grass nd mud. It was throwing gravel upward as it was backing

out. All I could see is headlights in front of me where I'm at by that time. When I moved around toward the driver's side of the truck, I could see that Officer Lovelady was back on the right-hand side of the truck, being the passenger side.

"When the truck comes out of the yard, it's in full acceleration and begins to arc over to where Officer Lovelady's standing. The front tires were cut to the left, the truck was in full acceleration in reverse, and the front end of the truck was swinging out to the right. It hit Officer Lovelady. I saw Officer Lovelady get hit by the truck and go into the air and disappear. By the way the wheels were turned sharply to the left and with the truck in full acceleration in reverse and with me standing toward the left side of the truck not being able to see Officer

Lovelady with the headlights now shining into my eyes but knowing that he had been knocked to the ground on the right side of the truck and that the truck was arcing toward him so I just was certain- there was not a single doubt in my mind- that the truck was immediately going to run over Officer Lovelady. The truck had become a dangerous force that easily could seriously injure or kill. I was repeatedly yelling to the driver of the truck, "Please stop, halt" and removed my service weapon and fired one single shot into the mid portion of the truck. I was probably ten or fifteen feet away from the truck. After I fired the shot, the truck was still in motion, the tires were still spinning, and nothing seemed to phase the driver with the first shot. I still feared more than ever for Officer Lovelady's life. I fired two simultaneous rounds within probably half a second.

The .45 caliber hand gun I used that night had seven shells in it before I fired the first shot.

"After I fired the second two simultaneous shots, the truck still did not stop or slow down. It didn't do anything but keep moving in an arc-ward motion. I followed the truck. The truck was not stopping, I was still hollering at it. The driver's side window was down the whole time. The driver never at any time said anything at all. He just kept driving wildly.

"After the truck did not stop or slow down after I fired the third shot, I began trying to run after the truck, hollering at the driver to stop. The truck backed a distance away and momentarily stopped. I stopped, too. This was an old model truck, and I could hear the RPMs in the engine rev up, and the driver grounded back into another gear. Then it started

coming forward again. If it had been on dry pavement, it could have been going fast. The RPMs and the wheels were moving extremely fast. It was in motion. At that time, I yelled at the truck again to stop and shot directly at this point into the truck while it was moving forward. I did that, because people were in the street and there were people ahead of the truck and it was moving forward and I was absolutely certain in my own mind that the truck immediately was going to hit or run over and kill someone. He hadn't stopped for Officer Lovelady. I was sure he wouldn't stop for them. After I fired that fourth shot, the truck finally stopped. I hollered for the driver to get out of the truck. I hollered it several times and he got out. When he got out, I did not recognize him. He got out of the truck and was holding on to the truck door, looking

direct at me. He had his hand down to his side. I told him to put his hands in the air because I needed to know what was in his hands. It was dark and I couldn't see what was in his left hand. He didn't have anything in there when he raised his hand. He let go of the truck and fell down to the ground.

"I holstered my weapon and immediately ran up towards the truck. As I came to the truck, the body of the driver was laying on the ground. He was a Caucasian male. I saw movement to my left. I saw Officer Lovelady. I looked at Officer Lovelady. I said, "Are you all right?""He said, "I believe I am. And I said, "I thought he got you." I said that because when the truck kept moving after I fired the third shot while the truck was moving back in reverse before it stopped later on, I feared that the truck probably had killed Officer Roy Lovelady. I was

so surprised and relieved to see him standing there.

"I immediately called for an ambulance, Lieutenant Couldron and the Chief of Police McMullen. I called for them in that order. My first concern was to get medical help for the driver of the truck. I knew absolutely nothing about giving medical treatment for that kind of injury. I knew in my own mind that only a medical doctor could treat that type of injury. I was not a medical doctor. Anything I could have done by way of medical treatment probably would have done more harm than good. Calling for medical help for him immediately was the only intelligent thing to do. There was no other way to help him.

"Right after I called for an ambulance to get medical help for the driver, I got the license plate number off of the

truck to let the dispatcher what's going on, that we did have a vehicle involved. "I told Officer Jerry Stafford that there was a police-involved shooting and a suspect was on the ground. I told him that by radio. He misunderstood what I meant and asked, "Which way is he going?" and I said, "Just get here, he's on the ground."

"I observed Officer Stafford coming up the street on Buchanan. He stopped his patrol unit with its emergency lights on.

"By then, I was crying. I was very upset. And he took me back and said to get in his vehicle. Just shortly after that, I remember seeing a Meissner-Brown ambulance arrive. A helicopter came in and landed. The Meissner-Brown ambulance and the helicopter arrived very quickly after the shooting.

"I do not know of anything that I could have done after the driver got out of the

truck to save him from a medical standpoint, but I immediately did the one thing which I knew I could do by immediately calling for an ambulance to get him medical help. That was our policy. I was glad to see medical assistance get there fast.

"At the time when I fired the first shot and at the time when I fired almost simultaneously the second and third shots, I did so to protect Officer Roy Lovelady, because from my viewpoint of what I was observing and seeing as all of the events were unfolding I absolutely and reasonably believed that my intervention was immediately necessary to protect Reserve Officer Roy Lovelady and from my viewpoint of what I was observing and seeing as those circumstances were rapidly evolving as I reasonably believed them to be, I reasonably believed that the use of force that I used was immediately

necessary to protect Officer Roy Lovelady from the use or attempted use of unlawful force and the use or attempted use of unlawful deadly force against Officer Roy Lovelady and I definitely and reasonably believed from my viewpoint of what I observed and saw that Officer Lovelady would have been justified in using deadly force to protect himself.

"From the viewpoint which I occupied as these events unfolded, those were my motivations and concerns in taking the actions that I took, and until saw Officer Lovelady alive after I had fired the fourth shot, I was convinced he was dead. When I fired the fourth shot, I was absolutely convinced and reasonably believed that the truck was going to hit someone else and kill or injure someone else and that my immediate intervention was necessary to protect these people and that based on the circumstances as I

reasonably believed them to be, that they would have been justified in using deadly force to protect themselves in self-defense.

"That night in my presence and view, the driver of the truck committed the offense of assault and aggravated assault in striking Officer Lovelady with the truck, which was capable of causing serious injury or death the way it was being used by the driver of the truck. The driver of the truck became known to me as Bradley Peelman.

"During the two years that I served on the Sansom Park Police Department before these events on May 14, 1987, I had never had to use or attempt or threaten to use deadly force against anyone else in the course of my duties with the Sansom Park Police Department.

"I'm absolutely convinced that if I had not taken the action that I took that

night, that someone would be dead and Bradley Peelman would have escaped and hurt or killed someone. Nothing had stopped him till I fired the fourth shot.

"I would never had to use any force at all against the driver of the truck if he had just stopped after he hit Officer Lovelady when he was ordered to do so."

"I have personal knowledge of what I have said in this affidavit, and what I have said in this affidavit is true and correct within my personal knowledge.

/E.D. Haynes
Edward Deon Haynes

SUBSCRIBED TO AND SWORN TO BEFORE ME on this Fourteenth (14th) Day of April, 1989.

/s/
Notary Public For the State of Texas

/s/
Print Name of Notary

My Commission Expires on _____, 19__.

NO. 89-1872

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE CITY OF SANSOM PARK, TEXAS, ET AL,

Petitioners

VS.

DANA PEELMAN

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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June 8, 1990 ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED
BY PETITIONERS
(As Restated by Respondents)

1. Whether a United States District Court's determination that genuine issues of material fact preclude entry of summary judgment falls within the collateral order doctrine stated in Mitchell v. Forsyth?

2. Whether Petitioner Haynes is entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure?

3. Whether Petitioner McMullen is entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure?

4. Whether Petitioner City of Sansom Park is entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure?

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Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Dana Peelman individually, as Next of Friend to Matthew Peelman and as Community Survivor of the Estate of Bradley Peelman, Deceased, respectfully files this her Reply Brief in Opposition to the Petition for Writ of Certiorari filed in the above captioned and numbered cause.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit denying Petitioners' joint motion for rehearing, dated February 28, 1990, is attached to the Petitioners' Petition at Appendix B-1.

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit dismissing Petitioners' appeals for want of jurisdiction, dated January 26, 1990, is attached to Petitioners' Petition at Appendix C-1.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas denying Petitioners' joint motion for summary judgment, dated May 3, 1989, is attached to Petitioners' Petition at Appendix A-1.

JURISDICTION

Respondent challenges this Honorable Court's jurisdiction on the basis that the District Court's order denying Petitioners' joint motion for summary judgment due to the existence of genuine issues of material fact was not an appealable final order and that the Court of Appeal's dismissal of Petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U.S.C. Section 1254. C.f., Harlow v. Fitzgerald, 475 U.S. 800, 806 n.11 (1982) (noting but not reaching this issue), citing Nixon v. Fitzgerald, 457 U.S. 731, 741-742 (1982) (finding jurisdiction due to "serious and unsettled question" presented).[1]

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[1]Respondent's challenge to the Court's jurisdiction is more fully set out in the first of her Reasons for Denying the Writ, infra at page 7.

STATUTES AND RULES INVOLVED

Section 1254, Title 28, United States Code provides in relevant part as follows:

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Section 1291, Title 28, United States Code provides as follows:

> "The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

Rule 56 of the Federal Rules of Civil Procedure provides in relevant part:

> "(b) For Defending Party. A party against whom a claim counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without support affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> "(c) Motion and Proceedings Thereon. ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

A. Nature of Case and Disposition in Courts Below

With the exception of a few minor mischaracterizations of Respondent's claims and the alleged filing date of Respondent's reply to Petitioners' motion for summary judgment, made by Petitioners

in their "Course of Proceedings" section of the Petition (Petition for Certiorari, 3-6), Respondent would stipulate to the proceedings below described by Petitioners therein.

B. Statement of Facts

Respondent disagrees with most if not all of the facts stated by the Petitioners in their Petition. For the purposes of this proceeding, except where otherwise noted herein, Respondent would incorporate by reference the facts as stated by the Court of Appeals in its judgment and opinion below which is attached to the Petition at Appendix C-1.

REASONS FOR DENYING THE WRIT

I. The Supreme Court is without statutory authority to review the District Court's decision denying Petitioners' summary judgment and should defer to the reasonable Congressional limitation on the Supreme Court's jurisdiction imposed by 28 U.S.C. Section 1254(1).

The Petitioners seek to invoke the Court's jurisdiction under 28 U.S.C. Section 1254(1), a statute which invests the Supreme Court with authority to review cases "in" the Courts of Appeals. (Petition for Cert., 2) While Respondent does not question the Court's constitutionally derived judicial power to review a District Court's denial of a motion for summary judgment, or to review a Court of Appeals decision to dismiss for lack of jurisdiction such a decision by a District Court, Nixon v. Fitzgerald, 457 U.S. 731, 743 n.23 (1982), the Petitioners in the instant case have not

sought to invoke the Court's jurisdiction on this basis.

Although the Petitioners state that "no material issue of fact is in dispute" in this case (Petition for Cert, 28), the two courts below found, and the Petitioners themselves have previously conceded that virtually every factual allegation made by Respondent remains in dispute. (Appendix to Pet. for Cert., C-7). With the utmost respect for the Court, resolution of the many disputed issues of fact in this case, most of which turn on credibility determinations of the conflicting accounts of eye witnesses or others with personal knowledge of the events alleged, simply is not a proper responsibility for this Court to assume. For this reason Respondent respectfully urges the Court to rule that Petitioners' appeal was never "in" the Court of Appeals within

the meaning of 28 U.S.C. Section 1254(1), and in deference to the jurisdictional limitation imposed by Congress thereunder, deny the Petition for Writ of Certiorari filed by the Petitioners in this case.[2]

II. The District Court properly denied Petitioner Haynes' motion for summary judgment.

Although there exists a persuasive argument that Petitioners have failed to carry their initial burden under Fed.R. Civ.P. 56 of specifically identifying the allegations of Respondent which they maintain are not supportable by evidence,[3] in the Courts below Respondent

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[2]Harlow v. Fitzgerald, 457 U.S. 800, 806 n.11 (1982) (noting but not reaching this question); Nixon . Fitzgerald, 457 U.S. 731, 741-743 (1982) (allowing for exception to Section 1254 on the ground that a "serious and unsettled" question of law was presented).

[3]See Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986) (White, J., concurring) ("It is not enough to move for summary judgment...with a conclusory assertion that the plaintiff has no evidence to prove his case.")

nonetheless moved forward and produced sufficient evidence upon which a reasonable jury could return a verdict for Respondent, the nonmoving party below.

At the time of the decedent's unconstitutional seizure on May 14, 1987, the Fourth Amendment standard for determining when a police officer may not use deadly force to seize an individual had been decided over two years earlier by the Supreme Court's decision in Tennesses v. Garner, 471 U.S. 1 (1985). Petitioners do not dispute that Tennessee v. Garner represented clearly established law at the time of the shooting of decedent but instead contend that Petitioner Haynes "was forced to fire shots in order to protect [another officer] and members of the public who were about to be run over by the [decedent's] vehicle." (Appendix

to Pet. for Cert, C-9). The summary judgment evidence produced by Respondent, however, discloses that the decedent's truck was either stuck in the mud or rolling backwards at "two to five miles an hour;" that, according to a city councilman who witnessed the shooting, there was, prior to the shooting, "never any person placed in jeopardy of serious injury" by the decedent's actions; and, that there was never any risk of the decedent escaping and no reason for shots to have been fired according to Officer Lovelady, who, according to Petitioner Haynes, was the officer supposedly to have been in danger. (See Reply Brief of Appellee filed in the Court of Appeals, No. 89-1458, at pages 33-34).

Whether a jury should believe the eye witness testimony of a city councilman of the Petitioner City, and the eyewitness

testimony of Petitioner Haynes' partner Officer Lovelady, or should instead believe the uncorroborated testimony of Petitioner Haynes, is clearly a matter of credibililty and for a jury to decide, not the United States Supreme Court.

III. The District Court properly denied Petitioner McMullen's motion for summary judgment.

The basis upon which Respondent claims Petitioner Chief of Police McMullen should be held liable is McMullen's alleged failures to make background inquires of individuals before employing them, and to adequately train individuals hired as police officers in the constitutional limitations on the use of deadly force when seizing fleeing suspects. As to the first allegation, Respondent submitted evidence that McMullen had, prior to the shooting of decedent, provided absolutely no training

training to the officers under his command as to the constitutional limitations on the use of deadly force. Other evidence disclosed that the police personnel under McMullen's command were left with the impression that use of deadly force was constitutionally permissible whenever a suspect attempted to flee, so long as it was "after dark." Even after the shooting of Bradley Peelman, this continued to be the understanding of the police personnel employed by the Petitioner City.

> "Q. Would you tell the court and jury what you understand the conditions are that authorize a police officer to use deadly force?
>
> A. When another human being's life is in jeopardy.
>
> Q. Is that the only circumstances when you're allowed to use deadly force?
>
> A. No. That's not the only, but that's....
>
> Q. Can you tell me any others?

A. There is -- in the law, when a -- after dark and a perpetrator is fleeing, you have the discretion to use deadly force.

Q. Perpetrator. What do you mean by perpetrator?

A. Actor, a criminal.

Q. Would you define criminal for us, as you understand it to be?

A. Anyone that has broken the law.

Q. So is it your understanding then that anyone who has broken the law and it's after dark and he is fleeing from a police officer, that you're authorized to use deadly force incident to preventing that person from fleeing?

A. That's my interpretation." (Deposition Testimony of Officer Lovelady, R.3,513-514).

Under McMullen's command, supplemental training was up to the discretion of the individual officer, and was not a requisite for continued service as a police officer (McMullen, R.3,0485). While it is clear the personnel under McMullen's command were inadequately trained in the proper use of deadly

force, and the shooting of Bradley Peelman was contrary to the constitutional restraints established in the Garner decision, McMullen continues to maintain Haynes' use of deadly force "was completely justified" since, according to McMullen, Haynes was not likely to have been convicted of a criminal offense under Texas Penal Code Section 9.33. Under Texas law, Section 9.33 is merely "a defense to prosecution," and does not "abolish or impair any remedy for the conduct that is available in a civil suit." See Texas Penal Code Sections 9.02, and 9.06 (Vernon). Thus, under the standard of training maintained by Chief McMullen, indictable conduct is "completely justified" because of this statutory defense.[4]

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[4]Petitioner Haynes was indicted for murder by a Tarrant County, Texas, Grand Jury as a result of decedent's death but was subsequently acquitted.

As with most other policies of the Sansom Park Police Department, the policy, or rather lack of policy with respect to the manner in which background checks of applicants for jobs at the police department were supposed to be conducted, was the responsibility of Petitioner McMullen. (R.3,0442-0443).

Although McMullen purports to have established a screening procedure, his additional testimony brings into question not only whether the policy was followed in Petitioner Haynes case, but also whether such a procedure exists at all. McMullen initially testified he delegated the responsibility for investigating Haynes' background to Officer Cauldron (R.3,463); that despite having been informed that Haynes had "had some problems" at the North Richland Hills Department at which Haynes previously

worked (R.3,461), this information was "nothing to take stock in" (R.3,464); and, that no information whatsoever was obtained from North Richland Hills because Cauldron never contacted that police department when "investigating" Haynes' background. (R.3,463). The foregoing statements, while internally inconsistent in and of themselves, are even more difficult to square with McMullen's more recent contention that "[a] background inquiry at North Richland Hills Police Department" was conducted and that this "reflected no negative information about Haynes."

The Deposition upon Written Questions and the oral deposition of Randy Shifflet, Captain of the North Richland Hills Police Department, and the oral deposition of Ron McKinney, Director of Personnel of the City of North Richland

Hills, reflect that no formal request for information was made of Shifflet or McKinney by anyone from the City of Sansom Park relative to Haynes' employment with North Richland Hills and that if even a casual inquiry were to have been made of Shifflet or McKinney, the inquirer would have been advised that no information could be released without a written authorization from Haynes. No such authorization was ever submitted to or received by the City of North Richland Hills and no information was furnished to the City of Sansom Park. Had such written authorization been received, according to these witnesses, the entire personnel record of Haynes would have been made available to the City of Sansom Park or its delegated policy-maker or investigator for its consideration in determining whether to employ Haynes, and

obtain from the state of Texas a commission for Haynes to enforce the law and carry a lethal weapon incident thereto on behalf of the City. (R.4,707-722). These records reflect that the City of North Richland Hills, having concluded that Officer Haynes "pose[d] a serious liability to the Department" (R.4,717), terminated Petitioner Haynes from his position as a police officer as a result of multiple incidents wherein Haynes used or threatened to use deadly force without any discernible justification whatsoever.

Based on the foregoing evidence, Plaintiff submits that a reasonable jury could conclude that no investigation of Haynes background was conducted and that the Chief's failure to see to it that this was done demonstrated a deliberate indifference to the constitutional rights

of persons whom his police personnel would likely come in contact, and that McMullen's acts or omissions constituted a substantial factor or cause of decedent's death.

Respondent believes this and other evidence presented by her raises a triable issue of fact, as the District court and Court of Appeals each held below.

IV. The District Court properly denied Petitioner City of Sansom Parks motion for summary judgment.

Predicated on prior circuit precedent, the Court of Appeals in a footnote to its opinion held that it was without jurisdiction to consider the appeal of Petitioner City of Sansom Park. See Appendix to Pet. for Cert. C-10 n.3. The Court of Appeals was surely correct in this regard, as another Court of Appeals has also recently held. Valdez v. City

and County of Denver, 878 F.2d 1285, 1287 n.2 (10th Cir. 1989). For the purpose of assuring the Supreme Court that the District Court properly denied the Petitioner City's motion for summary judgment however, Respondent would offer the following summary of the evidence submitted by Respondent to support her allegation of municipal liability.

Under 42 U.S.C. Section 1983, identification of municipal policymakers with final policymaking authority is a matter of local law and is for the Court presiding over the Section 1983 litigation to determine as a question of law. Jett v. Dallas Ind. School District, ___ U.S. ___, 105 L.Ed.2d 598, 628, 109 S.Ct. 1197, ___ (1989). In the present case the Petitioner City has expressly identified Chief of Police McMullen as having been delegated final

policymaking authority over operation of the police department, including but not limited to the hiring and training of police officers employed by the Petitioner City. (First Amended Original Answer of Defendant City of Sansom Park, paragraph 6). In light of the evidence submitted in connection with Respondent's supervisory liability claims against Chief McMullen in his personal capacity, some of which has been disclosed at pages 12-19, supra, it is clear that, given McMullen's undisputed official capacity as policymaker for the City with regard to the deficiencies alleged, the District Court correctly ruled that a genuine issue of fact exists, and that "it is for the jury to determine whether [McMullen's] decisions...caused the deprivation[s]" Respondent has alleged. Jett v. Dallas Ind. School District,

supra, 105 L.Ed.2d at 628, 109 S.Ct. at _____.

CONCLUSION

For the foregoing reasons, Respondent prays that the Petition for Writ of Certiorari filed in this case be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument have been set via U.S. Mail,

certified, return receipt requested, on this the 8th day of June, 1990, to:

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